

1
2
3
4
5 IN THE UNITED STATES DISTRICT COURT
6
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8
9 DEBORAH GETZ, et al., No. C 07-06396 CW
10 Plaintiffs,
11 v.
12 THE BOEING COMPANY, et al.,
13 Defendants.

ORDER DENYING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

14
15 Defendants Honeywell International, Inc. (Honeywell), The
16 Boeing Company (Boeing) and Goodrich Pump & Engine Control Systems,
17 Inc. (Goodrich) have filed a motion for summary judgment.
18 Plaintiffs oppose the motion.¹ Having considered all of the papers
19 filed by the parties and oral argument on January 29, 2008, the
20 Court DENIES Defendants' summary judgment motion.

21
22
23 _____
24 ¹Plaintiffs are thirty-three individuals who either were
25 injured in the helicopter crash that gave rise to this case or were
26 the heirs of individuals killed in the crash: Deborah Getz, Rodney
27 Thomas, Mary Duffman, Sophia Duffman, Christine Vaughn, Brad
28 Vaughn, Heather Vaughn, Taylin Vaughn, Jill Garbs, Doug Garbs, Paul
Wilkinson, Felicia Wilkinson, Tyffanie Wilkinson, Carson Wilkinson,
Robert J. Quinlan, Kathleen T. Quinlan, Julie Quinlan, Keely
Quinlan, Madeline Quinlan, Erin Quinlan, Hershel McCants, Sr.,
Goldie Murphy, Shannon McCants, Trevor McCants, Kylie McCants,
Jordan Lanham, Jerry Goldsmith, Ryanne Noss, Timothy Brauch, Chris
Trisko, Mark Daniel Houghton, Chuck Isaacson and Brenda Isaacson.

1 BACKGROUND

2 On February 17, 2007, a United States Army Special Operations
3 Aviation Regiment (SOAR) MH-47E Chinook helicopter bearing Tail
4 #94-00472 crashed in the Zabul Province of Afghanistan. All
5 twenty-two individuals on board the helicopter were military
6 personnel. Plaintiffs are the survivors of the crash and the heirs
7 of the individuals who were killed in the crash. Defendants are
8 companies that designed, assembled, manufactured, inspected,
9 tested, marketed and sold the helicopter, its component parts and
10 related software and hardware.

11 The following facts regarding the details of the crash are
12 taken from the Army Regulation 15-6 Report of Proceedings by
13 Investigating Office/Board of Officers (Army Report), attached as
14 Exhibit A to the Brandi Declaration submitted in support of
15 Plaintiffs' opposition to Defendants' motion to dismiss. See
16 Docket No. 80. Included in this report are the findings of the
17 Army's Investigative Office (Investigative Findings), as well as
18 numerous attachments, such as aircraft maintenance reports, autopsy
19 reports, weather forecasting data, voice transcripts of pilot
20 communications, aircrew sworn statements and aircraft manual
21 extracts. The Army Report is heavily redacted and uses a number of
22 undefined abbreviations and terms.

23 SOAR, the unit operating the helicopter at the time of the
24 crash, specializes in low-level night flying during combat and
25 rescue missions. On the day of the accident, the unit was
26 returning to its base in Bagram, Afghanistan along an "established
27 flight corridor" with two other helicopters after a mission to
28 "drop . . . off personnel to capture/kill someone in the Al-Qaeda

1 network" was cancelled. Army Report, Investigative Findings, 3(b);
2 Sworn Witness Statement taken at 11:09, at 1. According to one
3 eyewitness report, when the crew informed their commander that the
4 mission had been cancelled and they were planning to return to
5 base, the commander "agreed that [they] should recover to Bagram."
6 Id., Sworn Statement taken at 14:30, at 1. The helicopter took off
7 after a Performance Planning Card was completed, indicating that
8 the aircraft could perform the mission, and the crew received two
9 favorable weather forecasts. Id., Investigative Findings, 3(c);
10 Sworn Statement taken at 14:30, at 1. Sixty-four minutes into the
11 flight, the aircraft crashed, killing eight and injuring the
12 remaining fourteen people on board. Id., Investigative Findings at
13 1(a), 2(e).

14 According to the Army Report, "the preponderance of evidence
15 indicates that the primary cause of the accident was the sudden
16 catastrophic failure of the number two engine." Id. at 1(c). The
17 Army Report's Investigative Findings indicate that "the single
18 remaining operational engine could not provide the power required
19 to maintain sustained flight." Id. However, the MH47E Operator
20 Manual suggests that continued flight may have been possible with
21 only one working engine. Id., MH47E Operator Manual, section
22 9-2-7. According to the Army Report's findings, the pilot's
23 decision to enter an "avoid" range of 400 feet, rather than to
24 descend to a lower altitude, may have made continued flight
25 impossible. Id., Investigative Findings, at 4(f)(2-3). The Army
26 Report lists a number of possible reasons why the pilot did not
27 descend to a lower altitude, including the fact that he "lost all
28 primary instrumentation in the last few seconds of flight," that

1 the "standby instrument displays [were] poorly located," and that
2 he "had no visual references" because of poor weather conditions.
3 Army Report, Investigative Findings, at 4.

4 Although the root cause of the helicopter's engine failure has
5 not yet been determined, investigators have ruled out Foreign
6 Object Damage (FOD). Id. at 3(f). Moreover, Army investigators
7 found no evidence of friendly or hostile fire in the "relatively
8 benign . . . valley" over which the helicopter was flying at the
9 time of the crash. Id. at 3(a). Although the Army Report's
10 Investigative Findings rule out icing damage as a possible cause of
11 the accident, the witness reports uniformly mention seeing serious
12 icing on the aircraft right before the crash. Id. at 3(e); Sworn
13 Statement taken at 9:50, at 1 ("I turned my lip light on and
14 discovered icing on the minigun"); Sworn Statement taken at 9:52,
15 at 1 ("I noticed precipitation coming in from the window and trace
16 amounts of icing on the lower FOD screen of the number two
17 engine"); Sworn Statement taken at 10:00, at 6 ("Heavy/severe icing
18 to the point of 'ghost' terrain painted on radar display").

19 The Army Report also lists several factors that may have
20 contributed to the severity of the accident, including "a potential
21 component and or system failure of the engine fuel system, poor
22 weather (WX) forecasting and monitoring capabilities in
23 Afghanistan, . . . and improper pilot inputs." Id. at 1(c).
24 Witness Reports focus especially on the failure of the weather
25 forecasting in predicting what one passenger called "the worst
26 weather conditions I have encountered in 20 years." Id., Sworn
27 Statement taken at 10:00, at 6. The Army Report's Investigative
28 Findings state that "the unforecast weather requirements were a

1 significant contributing factor and had a profound impact on how
2 the PIC [pilot in command] reacted to the situation." *Id.*,
3 Investigative Findings, at 4(b). The Investigative Findings
4 reported no evidence, however, that "the inaccurate weather
5 forecasts and observations were due to human error." *Id.* at 3(d).

6 There is no evidence that the mission was poorly planned or
7 that the unit failed to maintain the equipment properly. Id. at
8 3(b),(g). The engine was only seven months old, and had shown no
9 signs of weakness in any prior flight crew inspection. Id. at
10 3(g). However, there had been past reports of other engine
11 failures on Chinook aircraft prior to this incident. Id. at
12 4(a)(1).

13 Alleging that the defective design and production of engine
14 number two was the primary cause of the crash, Plaintiffs are
15 seeking monetary damages from Defendants for wrongful death, bodily
16 injuries, and loss of consortium based on the legal theories of
17 negligence, strict product liability, and breach of express and
18 implied warranty.

LEGAL STANDARD

20 Summary judgment is properly granted when no genuine and
21 disputed issues of material fact remain, and when, viewing the
22 evidence most favorably to the non-moving party, the movant is
23 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
24 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
25 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
26 1987).

27 The moving party bears the burden of showing that there is no
28 material factual dispute. Therefore, the court must regard as true

1 the opposing party's evidence, if supported by affidavits or other
2 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
3 F.2d at 1289. The court must draw all reasonable inferences in
4 favor of the party against whom summary judgment is sought.
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
6 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
7 1551, 1558 (9th Cir. 1991).

8 Material facts which would preclude entry of summary judgment
9 are those which, under applicable substantive law, may affect the
10 outcome of the case. The substantive law will identify which facts
11 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
12 (1986).

13 DISCUSSION

14 In Boyle v. United Technologies Corporation, 487 U.S. 500, 512
15 (1988), the Supreme Court held that "state law which holds
16 Government contractors liable for design defects in military
17 equipment does in some circumstances present a 'significant
18 conflict' with federal policy and must be displaced." The Court
19 described one such circumstance as "when (1) the United States
20 approved reasonably precise specifications; (2) the equipment
21 conformed to those specifications; and (3) the supplier warned the
22 United States about the dangers in the use of the equipment that
23 were known to the supplier but not the United States." Id. When
24 these requirements are met a government contractor cannot be held
25 liable under state law. Id.

26 The Ninth Circuit subsequently addressed whether to extend
27 Boyle to protect government contractors who were sued under state
28 law for design defects in a weapons system under other

1 circumstances. See Koohi v. United States, 976 F.2d 1328 (9th Cir.
2 1992). The incident underlying Koohi took place on July 3, 1988,
3 in the midst of the Iran-Iraq war, after the United States
4 announced that it would protect Kuwaiti ships from attacks by Iran.
5 The USS Vincennes, a naval cruiser equipped with the computerized
6 Aegis air defense system, mistook an Iranian civilian aircraft for
7 an Iranian F-14, and shot down the civilian aircraft. Id. at 1330.
8 The heirs of some of the deceased passengers and crew alleged
9 claims against the United States for negligent operation of the
10 Vincennes and claims against the weapons manufacturer for design
11 defects in the Aegis system. Id.

12 The Ninth Circuit held that the plaintiffs' claims against the
13 United States fell squarely into the combatant activities exception
14 of the Federal Tort Claims Act. Id. at 1335. This exception
15 provides that the government does not waive its sovereign immunity
16 from suits regarding "any claim arising out of the combatant
17 activities of the military or naval forces, or the Coast Guard,
18 during time of war." 28 U.S.C. § 2860(j). In determining whether
19 the incident in question occurred "during time of war" the court
20 reasoned, "It seems clear that the purpose of the exception we are
21 construing is to ensure that the government will not be liable for
22 negligent conduct by our armed forces in times of combat." Id. at
23 1334. Then the court noted that there are "three principal reasons
24 for the combatant activities exception." Id. "First, tort law is
25 based in part on the theory that the prospect of liability makes
26 the actor more careful." Id. The court observed that Congress
27 "did not want our soldiers, sailors, or airmen to be concerned
28 about the possibility of tort liability when making life or death

1 decisions in the midst of combat." Id. at 1335. Second, "tort law
2 is based in part on a desire to secure justice -- to provide a
3 remedy for the innocent victim of wrongful conduct." Id. The
4 court noted that "it would make little sense to single out for
5 special compensation a few of these persons -- usually enemy
6 citizens -- on the basis that they have suffered from the
7 negligence of our military forces rather than from the overwhelming
8 and pervasive violence which each side intentionally inflicts on
9 the other." Id. Third, holding the government liable would not
10 serve the "punitive aspect to tort law." Id. In sum, these three
11 reasons supported the court's conclusion that "tort law, in toto,
12 is an inappropriate subject for injection into the area of military
13 engagements." Id.

14 The court then turned its attention to the weapons
15 manufacturer, a government contractor. The court first noted that
16 the weapons manufacturer, as a private party, was not entitled to a
17 defense of sovereign immunity. The court continued, "However, the
18 Supreme Court has recognized that the exceptions to the FTCA
19 [Federal Tort Claims Act] may preempt common law tort actions
20 against defense contractors under certain circumstances." Id. at
21 1336 (citing Boyle, 487 U.S. at 511). Then the court analyzed
22 "whether the plaintiffs' action against the Aegis manufacturers is
23 preempted by the 'combatant activities' exception." Id. The court
24 focused on the fact that "one purpose of the combatant activities
25 exception is to recognize that during wartime encounters no duty of
26 reasonable care is owed to those against whom force is directed as
27 a result of authorized military action." The court continued,

28 While the purpose of the Aegis system may have been, in

1 part, to protect the lives of United States servicemen,
2 its purpose surely was not to protect the lives of enemy
3 forces or persons associated with those forces. Neither
4 the United States nor its defense contractors owed any
5 duty to such individuals. Because the Iranian Airbus
6 took off from an Iranian joint commercial-military
7 airport, was flying in the area of a combat zone, and
8 failed to communicate its civilian status to the crew of
9 the Vincennes, the direction of force against the
10 aircraft by the United States naval forces cannot give
11 rise to tort liability. The imposition of such
12 liability on the manufacturers of the Aegis would create
13 a duty of care where the combatant activities exception
14 is intended to ensure that none exists.

15 Id. at 1337.

16 Defendants argue that Koohi stands for the broad proposition
17 that the combatant activities exception provides immunity to all
18 government contractors manufacturing military equipment. The Court
19 disagrees. Koohi focuses on whether the purposes of tort law would
20 be furthered by requiring weapons manufacturers to extend a duty of
21 care to "enemy forces or persons associated with those forces."
22 The present case concerns extending the duty of care to United
23 States servicemen, the people the helicopter was designed to
24 protect. The lack of a duty of care owed to enemies in war does
25 not apply to our own military personnel.

26 As Koohi noted, the clear purpose of the combatant activities
27 exception "is to ensure that the government will not be liable for
28 negligent conduct by our armed forces in times of combat." Id. at
1334. Under Koohi, the Court must determine whether imposing
liability on the manufacturers and designers of the subject
helicopter would "create a duty of care where the combatant
activities exception is intended to ensure that none exists." Id.
at 1337. To make this determination, the Court examines the three
principles underlying the combatant activities exception identified

1 in Koohi.

2 First, the Court must analyze whether holding a defendant
3 liable in this case would "make the actor more careful." Id. at
4 1334. In Koohi, the court noted that Congress did not want
5 servicemen to worry about tort liability when "making life or death
6 decisions in the midst of combat." Id. at 1335. Conversely, here,
7 designing and manufacturing an Army combat helicopter should be
8 exercised with great caution so as to provide non-defective
9 products for its intended users.²

10 Second, the Court must analyze whether tort law would "secure
11 justice" and provide a "remedy for the innocent victim of wrongful
12 conduct." Id. In Koohi, the court emphasized that war "produces
13 innumerable innocent victims of harmful conduct -- on all sides,"
14 and that it would not make sense to distinguish between victims of
15 negligent and intentional acts by military forces when deciding
16 whether to provide a tort remedy. Id. Here, the military
17 personnel killed were also "innocent victims," but they were not
18 victims of the type of "harmful conduct" contemplated in Koohi.
19 The harmful conduct complained of here arises from an allegedly
20 defective product designed to transport and protect military
21 personnel, not from weapons systems that fired and killed enemy
22 citizens during combat.

23 Third, the Court must analyze whether the "punitive aspect" of

24

25 ²As noted above, Boyle provides government contractors with
26 protection for this activity "when (1) the United States approved
27 reasonably precise specifications; (2) the equipment conformed to
those specifications; and (3) the supplier warned the United States
about the dangers in the use of the equipment that were known to
the supplier but not the United States." Boyle, 487 U.S. at 512.
However, Defendants are not moving for summary judgment on the
Boyle defense.

1 tort law would be furthered by holding Defendants liable. Id. The
2 court in Koohi noted that "it is unlikely that there are many
3 Americans who would favor punishing our servicemen for injuring
4 members of the enemy military or civilian population as a result of
5 actions taken in order to preserve their own lives and limbs." Id.
6 In contrast, it is unlikely that many Americans would not want to
7 punish companies that provided defective products to the military,
8 when the use of those products resulted in severe injuries and
9 death to their own soldiers. Therefore, none of the principles
10 underlying the FTCA's combatant activities exception applies to the
11 circumstances of this case.

12 Defendants also rely heavily on Bentzlin v. Hughes Aircraft
13 Co., 833 F. Supp. 1486 (C.D. Cal. 1993), and Flanigan v. Westwind
14 Technologies, Inc., No. 07-1124, 2008 U.S. Dist. LEXIS 82203 (W.D.
15 Tenn. Sept. 15). In Bentzlin, family members of Marines who were
16 killed in combat by friendly fire sued a weapons manufacturer,
17 alleging that a manufacturing defect caused the missile to deviate
18 from its intended target and strike the Marines. Id. at 1487. The
19 district court analyzed the combatant activities exception and held
20 that a "government contractor who manufacturers the weapons of war
21 cannot be liable for deaths of American soldiers arising from
22 combat activity." Id. at 1494. Bentzlin is not binding precedent.
23 The district court in Bentzlin recognized that "Koohi is limited in
24 its precise holding to suits brought by so-called 'enemies' of the
25 United States," but expanded the doctrine beyond the stated
26 holding.

27 In Flanigan, the pilot of an Apache helicopter was killed when
28 his helicopter crashed in Afghanistan without warning. 2008 U.S.

1 Dist. LEXIS 82203 at *1. The pilot's widow sued the manufacturers
2 of the helicopter and its component parts alleging that they
3 negligently manufactured these products. Id. at *2. The court
4 provided little analysis before concluding that the combatant
5 activities exception preempted the plaintiff's state tort claims.
6 Id. at *10. Moreover, Flanigan is also not binding precedent.

7 The Court concludes that holding Defendants liable for product
8 defects in the subject helicopter would not "create a duty of care
9 where the combatant activities exception is intended to ensure that
10 none exists." Koohi, 976 F.2d at 1337. Therefore, the combatant
11 activities exception to the FTCA does not preempt state law in this
12 case.

13 CONCLUSION

14 For the foregoing reasons, the Court denies Defendants' motion
15 for summary judgment. Docket No. 144.

16 IT IS SO ORDERED.

17
18 Dated: 3/10/09



19 CLAUDIA WILKEN
United States District Judge

20
21
22
23
24
25
26
27
28